Supreme Court, U.S.
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No. 97-2007

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MSW INVESTMENTS, A TEXAS JOINT VENTURE,
Petitioner,
v.
CHEVRON U.S.A. INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals properly affirm the award of an arbitrator who ruled that Petitioner had failed to properly exercise a right of first refusal it possessed in property owned by Respondent and that Respondent's refusal to sell the property was justified?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, Respondent Chevron U.S.A. Inc. hereby lists the corporate entities related to it. The following is the parent company of Respondent Chevron U.S.A. Inc.: Chevron Corporation. The following are the non wholly-owned subsidiaries of Chevron U.S.A. Inc.: Chevron Credit Bank, N.A.; Chevron do Brasil Ltda.; Chevron Oil Congo S.A.R.L.; Compania Minera Chevron Dominicana, S.A.; Felix Oil Company; Midstream Barge Company, L.L.C.; NGC Corporation; Pembroke Capital Company Inc.; and TBA Supply Company.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Underlying Facts

Pursuant to the terms of a 1993 Compromise and Settlement Agreement [the "Agreement"] (R. 042) between Petitioner MSW Investments and Respondent Chevron U.S.A. Inc. in unrelated litigation, Chevron purchased an approximately one-acre parcel of land in Dallas, Texas [the "Property"], and granted "to MSW (and not to MSW's partners individually) a right of first refusal to repurchase the property" in the event of future sale by Chevron, on the same terms and conditions as offered by a potential buyer and accepted by Chevron. (R. 043). After a third party presented a written offer to Chevron to purchase the Property which Chevron found accept-

able, Chevron advised MSW of the third-party offer pursuant to the terms of the Agreement (R. 507), and forwarded a copy of that third-party offer. (R. 457). Lawrence Steinberg, purporting to act on behalf of MSW as managing partner, attempted to exercise the right of first refusal (R. 508), but without submitting documentation that he had the authority to so bind MSW or that MSW stil existed. (R. 510; S.R.[1] 0027, 0029, 0031). The documents forwarded by Steinberg in response revealed that he, in fact, was not authorized to bind the partnership, and they also called into question whether MSW still existed. Steinberg refused to provide the requested proof of authority and other requested documentation in response to further requests, even though Chevron on multiple occasions extended the time during which MSW could exercise the right of first refusal. (S.R. 0027, 0029, 0031). Instead, MSW filed a lawsuit against Chevron in Texas state court, and filed a lis pendens on the Property. (R. 008, 014).

B. Proceedings Below

Following removal by Chevron of MSW's action against it to the United States District Court for the Northern District of Texas on July 27, 1995, that court, on July 24, 1996, ordered the parties to arbitrate their disputes before an arbitrator mutually selected by the parties. On February 21, 1997, the arbitrator entered an award that concluded, in pertinent part, that MSW had not properly exercised the right of first refusal it possessed relating to the Property and that Chevron was justified in refusing to sell the Property. (R. 446).[2] Following the filing of a

[1] "S.R." references are to the Supplemental Record which Chevron filed in the United States Court of Appeals for the Fifth Circuit.

[2] In terms of measuring the extent of the controversy between the parties, it bears mention that the arbitrator concluded that the right of first refusal was *not* extinguished as a result of the improperly attempted exercise. Rather, the right retained its vitality in the event Chevron should subsequently receive an offer on the property which it desired to accept.

Motion to Confirm by Chevron (R. 440) and a Motion to Vacate by MSW (R. 485), the district court confirmed the award, and entered a Judgment on May 19, 1987. (R. 724). MSW appealed to the Fifth Circuit, arguing in its November 18, 1997 brief that the arbitral award should be vacated on the basis of the "essence" test and that the arbitrator manifestly disregarded the law. Finding such standards impermissible on a motion to vacate, the Fifth Circuit affirmed in a brief per curiam opinion.

REASONS FOR DENYING THE WRIT

The arbitrator's decision here under review was a workaday interpretation of a contract between MSW and Chevron. There is, moreover, no substantive disagreement among the courts of appeals as to when they may vacate an arbitrator's award. Virtually all of the assertedy conflicting language cited by Petitioner is dictum. The results reached by the courts of appeals are all in harmony, and neither the court below nor any other court decision cited in the Petition, has departed from the standard of review set by the Federal Arbitration Act itself. There is, therefore, nothing deserving this Court's attention.

I. THE FEDERAL ARBITRATION ACT ESTABLISHES A FEDERAL POLICY FAVORING ARBITRATION AND PROVIDING FOR EXTREMELY LIMITED JUDICIAL REVIEW OF ARBITRATORS' DECISIONS.

The Federal Arbitration Act established a "federal policy favoring arbitration," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), and "was intended to 'revers[e] centuries of judicial hostility to arbitration agreements,'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974));

Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20, 24 (1991). This Court has instructed that the judiciary must respect parties' conscious choice for the ease and convenience of arbitration over formal, full-scale, costly litigation. In *Mitsuibishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985), for example, this Court observed that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alterantive means of dispute resolution." *See also Gilmer*, 500 U.S. at 34 n.5. And the Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), has been characterized as "an unequivocal rejection of the belief that a judicial forum is needed to protect the substantive rights of parties and a clear statement that judicial hostility to arbitration would no longer be countenanced." Phillip C. Essig, *U.S. Supreme Court Tackles Arbitration Issues*, N.Y.L.J., Feb. 14, 1995, at 1; *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) ("To the extent that *Wilko* [*v. Swan*, 346 U.S. 427 (1953)] rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.").[3]

The primary concern of Congress in passing the Federal Arbitration Act "was to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also Shearson/American Express, Inc.*, 482 U.S. at 225-26. Congress further recognized the additional potential benefit

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[3] In view of this criticism of *Wilko*, the Petitioner misplaces its extensive reliance on that case as the purported source of authorization of broad judicial review. See Petition, at 5, 8.

to parties of resolving disputes quickly and more cheaply. *Dean Witter Reynolds Inc.*, 470 U.S. at 221; *Alberto-Culver Co.*, 417 U.S. at 510-11; *Wilko v. Swan*, 346 U.S. 427, 431, 438 (1953).[4] By freely agreeing to arbitrate potential claims, parties "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.*, 473 U.S. at 628. One consequence of that decision is that the parties to an arbitration agreement have consented to accept the facts and the law as the arbitrator or arbitrators find them; like the courts, the parties are equally bound to respect those arbitral determinations. Were parties guaranteed significant substantive judicial review upon receipt of an unfavorable arbitral award, much of the FAA's supporting logic would be lost. *Misco*, 484 U.S. at 38. "[A]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993); *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995).

To effectuate this policy, courts must accept arbitrators' findings of fact and conclusions of law in nearly all cases. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987); *see also, e.g., Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir.), *cert. denied*, 512 U.S. 1205 (1994); *Board of County Comm'rs v. L. Robert Kimball & Assocs.*, 860 F.2d 683, 685 (6th Cir. 1988), *cert. denied*, 494 U.S. 1030 (1990). "[C]ourts are not authorized to reconsider the merits of an award even though the parties

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[4] There are additional reasons for a uniform national policy favoring arbitration. *E.g., Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1170-80 (11th Cir. 1981) (reduction in congestion in courts to the benefit of other litigants).

may allege that the award rests on errors of fact or on misinterpretation of the contract." *Misco*, 484 U.S. at 36; *see also id.* at 37-38. Courts may set aside arbitral rulings "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 940, 942 (1995).

II. IN CONFORMITY WITH THESE PRINCIPLES, REVIEWING COURTS HAVE ONLY VERY RARELY VACATED ARBITRATORS' DECISIONS.

Despite all of the Petitioner's attempts to find inconsistency in discussion in the case law and the secondary literature, it is exceptionally rare that a reviewing court vacates the decision of an arbitrator under the Federal Arbitration Act. In fact, as the numerous opinions cited in MSW's Petition and additional research readily reveal, in only a handful of cases have commercial arbitration awards ultimately been vacated at the appellate level. *See, e.g., Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988); *Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F.2d 1195 (9th Cir. 1982). Standards such as the "essence of the contract" test and "manifest disregard" of the law do not betoken any substantive difference in the scope of the review provided but remain, in the words of one commentator, "theoretical construct[s]." [5] The fact is that the courts of appeals apply a narrow standard of judicial review entirely consistently.[6]

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[5] Stephen L. Hayford, *Law-in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 776 (1996).

[6] To illustrate, of the numerous cases cited by Petitioner, in only one was a commercial arbitration award on the merits ultimately vacated by a circuit court of appeals on the basis of "manifest disregard" of the law. *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997). As recently as 1996, one commentator noted that no commercial arbitration had even been vacated on the basis of "manifest disregard" of the law. Hayford, *supra*, at 776, 777; *see also* Brad A. Galbraith, Note, *Vacatur of Commercial*

III. REGARDLESS OF PRECISE TERMINOLOGY, COURTS OF APPEALS APPLY THE STANDARDS OF REVIEW DICTATED BY THE FEDERAL ARBITRATION ACT.

The Fifth Circuit and other courts have looked exclusively to the literal terms of the review provisions found in 9 U.S.C. § 10(a) in resolving motions to confirm or vacate arbitral awards. The statement of the Fifth Circuit in *Forsythe Int'l, S.A. v. Gibbs Oil Co.* is typical:

> judicial review of a commercial arbitration award is limited to Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Accordingly, a district court has no authority to vacate an arbitration award unless: (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers. 9 U.S.C. § 10(a)-(d).

915 F.2d 1017, 1020 (5th Cir. 1990) (citation omitted); *see also, e.g., Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990) ("[T]he Supreme Court has held that the grounds for vacating an arbitrator's award are limited to [the] . . . statutory categories [contained in 9 U.S.C. § 10].").[7] By their very terms, the four grounds set forth in the Federal Arbitration Act all relate to the conduct of the

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Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard, 27 IND. L. REV. 241, 252 (1993). Independent research by Respondent reveals no court of appeals decision other than *Montes* in the period from 1996 to 1998 in which a commercial arbitration award was vacated for "manifest disregard" of the law.

[7] *See also, e.g., R.M. Perez & Assocs. v. Welch*, 960 F.2d 534 (5th Cir. 1992); *Moseley, Hallgarten, Estabrook & Weeden v. Ellis*, 849 F.2d 264 (7th Cir. 1988); *LaFarge Conseils et Études, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334 (9th Cir. 1986).

arbitrator during the arbitral process, or to the rendering of an award which is outside the scope of the matter submitted to the arbitrator. They do not relate to the merits of arbitral determinations of fact or law, unless those determinations evidence misconduct on the part of the arbitral decision maker. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995).[8]

In the Petition, MSW suggests that two formulations of the standard of review mentioned by some courts—"manifest disregard of the law" and the "essence test"—are distinct from the standard of review set forth in the Federal Arbitration Act and that they, accordingly, substantively supplement the Federal Arbitration Act.

First, as stressed above, however, the Petitioner does not and cannot point to any change in the outcome of a case based upon application of the "manifest disregard" standard. Moreover, that standard, even as a theoretical construct, does not express a standard of review any different from the statute. Although the Petition (at 4, 5 n.1) refers to the "manifest disregard" standard as "judicially created" and "non-statutory," several courts have found it to be based on 9 U.S.C. § 10(a)(4), which allows a court to overturn decisions of arbitrators that "exceed[] their powers."[9] This is consistent with this Court's dictum

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[8] As stated by the Fourth Circuit, "in reviewing arbitral awards, a district or appellate court is limited to determining 'whether the arbitrators did the job they were told to do not whether they did it well, or correctly, or reasonably, but simply whether they did it.'" *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union*, 973 F.2d 276, 281 (4th Cir. 1992) (internal quotation omitted)), *cert. denied*, 513 U.S. 1112 (1995).

[9] *See, e.g., Robbins v. Day*, 954 F.2d 679, 683 (11th Cir.), *cert. denied sub nom. Robbins v. PainWebber, Inc.*, 506 U.S. 870 (1992);

regarding "manifest disregard" in *Wilko*, the opinion to which the appellate courts have invariably pointed as the genesis of the manifest disregard of the law theory. This Court's discussion in *Wilko* commences, "Power to vacate an award is limited." Adjoined to this statement is a footnote which quotes 9 U.S.C. § 10 without further comment, and the immediately following remarks in the main text set forth the "manifest disregard" language. *Wilko*, 346 U.S. at 436-37 & 436 n.22.

The other basis for vacatur which Petitioner MSW asserted at the court of appeals is the so-called "essence test." [10] The essence test stems from several labor arbitration decisions of this Court, most notably *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363

Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc., 894 F.2d 862, 866 (6th Cir. 1990); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960); *see also Soler Chrysler-Plymouth*, 473 U.S. at 656 (Stevens, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. § 10."). Several prominent commentators have also concluded that this test is an illustration of § 10(a), not an additional ground for vacatur independent of the FAA. Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 257-58 (1993) (illustration of § 10(a)(4)); Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, DISPUTE RESOLUTION J., Oct. 1996, at 22, 80-81 (most plausible reading of the *Wilko* dictum "is one whereby its oblique reference to 'manifest disregard' is viewed as identifying a type of arbitral misconduct or misbehavior of the nature addressed in § 10(a)(3) of the FAA which can trigger vacatur under that provision"). *Compare Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 n.5 (1st Cir. 1990), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (manifest disregard avenue of review is judicially-created and not derived from 9 U.S.C. § 10).

[10] This ground was not presented in Petitioner's district court Motion to Vacate the Arbitration Award (R. 485).

U.S. 593, 597 (1960). Of course those decisions are not precedent for commercial arbitration, which (unlike labor arbitration) is governed by the Federal Arbitration Act. As applied in the commercial arbitration context, the standard has been properly understood to be derived from 9 U.S.C. § 10(a)(4). *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir.), *cert. denied sub nom. Robbins v. PaineWebber, Inc.*, 506 U.S. 870 (1992); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1130 n.11 (3d Cir. 1972); *see Kelley v. Michaels*, 59 F.3d 1050, 1053 (10th Cir. 1995); *Federated Dep't. Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988). Otherwise there is no warrant for its application.

In sum, there exist a number of shorthand terms of art that some courts employ to denominate the tests and standards they are applying in determining motions to vacate arbitral awards. But as Petitioner essentially concedes (Petition, at 5 n.1), there is no difference in the review standard set forth in these various formulations. Following an extensive discussion of the "various hues and colorations" of the formulations of the standard of judicial review of an arbitration, the First Circuit concluded that

> *the standard of review undergirding these various formulations* [*is*] *identical*, no matter how pleochroic their shadings and what "terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice." *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634 (10th Cir. 1988). *However nattily wrapped, the packages are fungible.*

Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990) (emphasis added).[11] Nor, as urged above, is there any

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[11] *See also Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1459 n.5 (11th Cir. 1997) (noting that each of the three rubrics

substantive difference in the review available under the Federal Arbitration Act and the review sought by Petitioner under the "tests" urged.

IV. THE ARBITRATOR'S AWARD IN THIS CASE WAS IN ANY EVENT PROPERLY CONFIRMED, BECAUSE IT WAS CORRECT UNDER ANY STANDARD.

The point urged by Petitioner is that it made a valid acceptance when presented the opportunity pursuant to the contractual right of first refusal contained in the Agreement. This contention is incorrect. The right of first refusal was expressly granted only to MSW, and it explicitly stated that it did not apply to MSW's individual partners. (R. 0430). Chevron accordingly requested a copy of the MSW partnership agreement, evidence of MSW's continuing existence, and evidence of Steinberg's authority. Even though Chevron extended the time on several occasions, ultimately the documents which were forwarded reinforced concerns about whether MSW continued to exist and about whether Steinberg possessed the requisite authority. (S.R. 0004-05). For example, MSW's Joint Venture Agreement required that Steinberg, as man-

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of review of arbitral awards there at issue "could conceivably be encompassed in the other"); *Jenkins v. Prudential Bache Sec., Inc.*, 847 F.2d 631, 634 (10th Cir. 1988) (suggesting that the various principles for review of arbitration awards embody "a sort of 'abuse of discretion' standard"); *Service Employees Int'l Union, AFL-CIO, CLC v. Local 1199 N.E., SEIU, AFL-CIO, CLC*, 70 F.3d 647, 651 (1st Cir. 1995) (reiterating the principle of *Advest* that the different articulations of the standard of review of an arbitral award are "in essence 'identical'"); Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759, 762-63 ("The lower courts have developed numerous variations of the essence of the contract standard. These variations set aside an award if it is 'completely irrational,' 'unfounded in reason and fact,' 'arbitrary and capricious,' 'palpably faulty,' not 'plausible,' or in '[m]anifest disregard of the law.' Whatever label applied, the vast majority of disputed arbitration awards are affirmed under the essence of the contract standard." (footnotes omitted)).

ager of venture property, obtain *written authorization* for any action beyond those limited ministerial duties of the manager of venture property set forth therein. (S.R. 0005). On these facts, it cannot be suggested that the arbitrator disregarded the law in concluding that MSW did not properly exercise the right of first refusal and that Chevron's refusal to sell the property was justified.

CONCLUSION

For all of the reasons given above, the Petition should be denied.

Respectfully submitted,

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